

1 WO  
2  
3  
4  
5

6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
8

9 Stormee J Brown, et al.,  
10 Plaintiffs,

11 v.

12 Pegasus Research Group LLC, et al.,  
13 Defendants.  
14

No. CV-16-03875-PHX-GMS

**ORDER**

15 Pending before the Court are Plaintiffs Stormee Brown, Julie Leggett and Megan  
16 East's Motion for Conditional Certification of FLSA Collective Action, (Doc. 12), and  
17 Defendant Pegasus Research Group, LLC d/b/a Televerde's ("Televerde") Motion for  
18 Leave to File a Surreply, (Doc. 32).<sup>1</sup> For the following reasons, the Court grants  
19 Televerde's Motion for Leave to File a Surreply and grants the Motion for Conditional  
20 Certification in part.

21 **BACKGROUND**

22 Televerde operates a "virtual sales and marketing service company" headquartered  
23 in Phoenix, Arizona. (Doc. 24 at 2.) Televerde employs over 350 sales agents  
24 throughout the country, including incarcerated women at state prisons in Arizona and  
25 Indiana. (Doc. 12 at 2.) Televerde has several distinct tiers of sales agents. There are  
26 Lead Development Representatives ("LDRs"), Inside Marketing Representatives  
27

28 <sup>1</sup> Neither party requested oral argument in this matter, thus the Court will not  
schedule a hearing prior to reaching its decision.

1 (“IMRs”), and Inside Sales Representatives (“ISRs”). (Doc. 24 at 2–3.) Of these  
2 positions, the IMRs and the ISRs were classified as exempt under the Fair Labor  
3 Standards Act (“FLSA”).

4 Each of the named Plaintiffs was employed as an IMR or an ISR with Televerde in  
5 the last two years. The named Plaintiffs allege that ISRs and IMRs share the same  
6 principal duties, including performing online research for potential customers, contacting  
7 potential customers, and preparing and submitting activity reports. (Doc. 12 at 3.) The  
8 Plaintiffs allege that Televerde systematically misclassified these positions as exempt  
9 under FLSA, and thus improperly denied them overtime pay.

10 Pursuant to 29 U.S.C. § 216(b), the Plaintiffs now seek conditional certification to  
11 bring a collective action claim on behalf of all ISRs and IMRs employed by Televerde  
12 within the last two years who worked over forty hours per week during that period.

## 13 **DISCUSSION**

### 14 **I. Legal Standard**

15 An employee may bring an FLSA collective action on behalf of himself and other  
16 employees that are “similarly situated.” 29 U.S.C. § 216(b). However, neither the statute  
17 nor the Ninth Circuit has defined the phrase “similarly situated.”

18 District courts within the Ninth Circuit “generally follow the two-tiered or two-  
19 step approach for making a collective action determination.” *Colson v. Avnet, Inc.*, 687  
20 F. Supp. 2d 914, 925 (D. Ariz. 2010). Under this approach, “a court typically makes an  
21 initial ‘notice stage’ determination of whether plaintiffs are ‘similarly situated.’”  
22 *Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1102 (10th Cir. 2001). The burden  
23 is on the plaintiff to establish that she is similarly situated to the rest of the proposed  
24 class, but the standard “requires nothing more than substantial allegations that the  
25 putative class members were together the victims of a single decision, policy, or plan.”  
26 *Id.* (internal quotation and citation omitted). “This determination is made under a ‘fairly  
27 lenient standard,’ which in the Ninth Circuit typically results in conditional certification.”  
28 *Shaia v. Harvest Mgmt. Sub LLC*, 306 F.R.D. 268, 272 (N.D. Cal. 2015). To be

1 successful, it is generally accepted that the plaintiff's allegations should be supported by  
2 declarations or affidavits by the plaintiff. *See id.*; *Velasquez v. HSBC Fin. Corp.*, 266  
3 F.R.D. 424, 427 (N.D. Cal. 2010) ("The notice stage determination is made under a fairly  
4 lenient standard and typically results in conditional certification. However, unsupported  
5 assertions of FLSA violations are not sufficient to meet Plaintiff's burden." (internal  
6 quotation and citation omitted)). At the close of discovery, typically upon a motion to  
7 decertify, the court will revisit the issue and consider a number of factors to determine  
8 whether the proposed class is truly similarly situated for the purposes of FLSA. *Thiessen*,  
9 267 F.3d at 1102.

10 But, at this stage of the proceedings, "the Court is concerned only with whether a  
11 definable group of similarly situated plaintiffs exists." *Warren v. Twin Islands, LLC*, No.  
12 1:11-CV-00098-BLW, 2012 WL 346681, at \*2 (D. Idaho Feb. 2, 2012). Thus, "in  
13 making a determination in whether to conditionally certify a proposed class for  
14 notification purposes only, courts do not review the underlying merits of the action."  
15 *Colson*, 687 F. Supp. 2d at 926.

## 16 **II. Analysis**

17 The Plaintiffs in this case request conditional certification for "all contact center  
18 sales agents," including "IMRs and ISRs and/or employees with the same or similar job  
19 duties as the Plaintiffs who were employed or are employed at the Arizona location."  
20 (Doc. 12 at 2.) In support of this, the Plaintiffs submitted a number of exhibits, including  
21 declarations from each named Plaintiff, a declaration from a potential plaintiff, Ms.  
22 Renee Ruggiero, email correspondence between Ms. Ruggiero and Plaintiff's counsel,  
23 and an organizational chart from February 2015. (Doc. 13-1.) The Plaintiffs also  
24 provided a model Notice form to be distributed amongst potential plaintiffs should the  
25 Plaintiffs succeed in obtaining conditional certification.

26 The declarations submitted by the Plaintiffs are sufficient to show that IMRs and  
27 ISRs "were together the victims of a single decision, policy, or plan" by the Defendant to  
28 misclassify certain employees as exempt under the FLSA. *Thiessen*, 267 F.3d at 1102

1 (internal quotation and citation omitted). The declarations establish that each of the  
2 named Plaintiffs, as well as Ms. Ruggiero, worked at Televerde’s Phoenix office and held  
3 similar positions. Ms. Brown and Ms. Leggett’s responsibilities as IMRs included  
4 performing online research, contacting potential customers, taking and communicating  
5 notes to team members, and establishing activity logs. (Doc. 13-1 at 2, 5.) Throughout  
6 their respective time at Televerde, both Plaintiffs were classified as exempt employees  
7 and therefore did not qualify for overtime pay, despite working more than forty hours a  
8 week.<sup>2</sup> (*Id.*) Both Plaintiffs also affirmed that other IMRs in the Phoenix office  
9 performed similar duties, and were also denied overtime pay. (*Id.*) In support of this, a  
10 potential plaintiff, Ms. Ruggiero, filed a declaration affirming that she was also an IMR,  
11 and she shared the same responsibilities as Ms. Leggett and Ms. Brown, and she was also  
12 denied overtime pay. (Doc. 13-1 at 10.) The other named Plaintiff, Ms. East, was  
13 employed as an ISR, and affirmed that her responsibilities were similar to that of the  
14 IMRs, but with some added responsibilities as well. (Doc. 13-1 at 8.) At this stage in the  
15 proceedings, these declarations meet the lenient standard plaintiffs must meet to qualify  
16 for conditional certification.<sup>3</sup>

17 However, the conditional certification is limited to include only IMRs and ISRs  
18 who worked more than forty hours per week at least at times during the relevant period.  
19 The Plaintiffs provided declarations and affidavits that established a foundation for the

---

21 <sup>2</sup> Televerde’s Motion for Leave to File a Surreply is granted. (Doc. 32.) While  
22 the content contained in Televerde’s proposed surreply is best left for discussion during  
23 the second stage of this two-tiered analysis, the confusion resulting from the Plaintiffs’  
24 conceded misstatement of the record in its Response justifies permitting the Defendant to  
file a surreply to clarify the record. (Doc. 35 at 2.)

25 <sup>3</sup> Televerde may file a motion to decertify at the close of discovery. At such time,  
26 the Court will revisit the question of whether certification is appropriate by “utilizing a  
27 stricter standard of ‘similarly situated’” that calls for the weighing of a variety of factors  
28 to determine if certification is proper, including: the differences in the employment  
settings amongst the individual plaintiffs, the “various defenses available to defendant  
which appear to be individual to each plaintiff”, and “fairness and procedural  
considerations.” *Thiessen*, 267 F.3d at 1103.

1 assertion that IMRs and ISRs may constitute a class of employees that are similarly  
2 situated for the purposes of collective action. The same cannot be said for the broader,  
3 unidentified class of “employees with the same of similar job duties as [the] Plaintiffs.”  
4 (Doc. 12 at 2.) Conditional certification should not be utilized to “authorize notice to the  
5 broadest possible class of plaintiffs, based solely on plaintiff’s unsupported allegations.”  
6 *Wertheim v. State of Arizona*, No. CIV. 92-0453 PHX RCB, 1992 WL 566321, at \*5 (D.  
7 Ariz. Aug. 4, 1992). Furthermore, “[w]hile the standard for conditional approval at the  
8 stage of the litigation is lenient, it does require *some evidentiary* support.” *Bishop v.*  
9 *Petro-Chem. Transp., LLC*, 582 F. Supp. 2d 1290, 1296 (E.D. Cal. 2008) (emphasis  
10 original). The Plaintiffs in this case offer no evidence in support of seeking such a broad  
11 group of employees as members of a conditional certification. To the contrary, Televerde  
12 submitted evidence that “the vast majority of contact sales agents include incarcerated  
13 women,” who “do not work at the corporate office, do not perform the same job duties as  
14 IMRs or ISRs, do not have the same supervisors as IMRs or ISRs, and have a very  
15 different compensation structure.” (Doc. 24-1 at 3.) This indicates that many of the  
16 contact sales agents are not similarly situated for the purposes of FLSA, and permitting  
17 the Plaintiffs to obtain the broader conditional certification they seek would be  
18 inconsistent with the goal of “orderly management of the litigation, the recognized  
19 purpose for allowing early court-approved notice to potential plaintiffs.” *Wertheim*, 1992  
20 WL 566321, at \*5.

21 As to the form of the proposed notice, the parties agree to limit the temporal scope  
22 to “two years and seven calendar days prior to the entry of the conditional certification”  
23 and to only send the notice through U.S. Mail. (Doc. 24 at 10–11; Doc. 28 at 9.)  
24 Additionally, the notice shall include Televerde’s counsel’s contact information. *See*  
25 *Belcher v. Shoney’s, Inc.*, 927 F. Supp. 249, 254 (M.D. Tenn. 1996) (including the  
26 defense counsel’s contact information in the notice to the potential plaintiffs).

27  
28

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

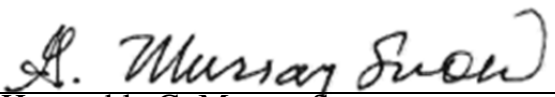
**CONCLUSION**

For the foregoing reasons, the Plaintiffs' Motion for Conditional Certification is granted in part and denied in part.

**IT IS THEREFORE ORDERED** that the Plaintiffs' Motion for Conditional Certification, (Doc. 12), is **GRANTED IN PART AND DENIED IN PART**.

**IT IS FURTHER ORDERED** that the Defendant's Motion for Leave to File a Surreply, (Doc. 32), is **GRANTED**. The Clerk of Court is directed to file the lodged document, (Doc. 33).

Dated this 6th day of June, 2017.

  
\_\_\_\_\_  
Honorable G. Murray Snow  
United States District Judge